

1 members of the Commission with us participating and offering  
2 their words as well.

3 I want to just focus on a few things because I know that  
4 you have experts here. You have excellent panelists to -- to  
5 make presentations. I'd like to just, for the record, mention  
6 a few of the points that many of my colleagues and I have been  
7 working on in Washington, D.C. First and foremost of course,  
8 the -- the public owns the airwaves. We all know that. And it  
9 was Congress that created the FCC to give it the opportunities  
10 to help manage those airwaves for the public's benefit. I hope  
11 that my colleagues and I will be prepared to act as well, based  
12 on what the FCC does or doesn't do, in trying to protect the  
13 public's interest with regard to those airwaves and perhaps  
14 we'll have to undertake a review of the FCC if we don't find  
15 that the FCC is willing to undertake a thorough and  
16 comprehensive review of these media ownership rules on its own  
17 and give the public an opportunity to provide input as well.

18 This seems like a runaway train. We have right now a  
19 little bit more than a month to review these rules, yet we're  
20 reviewing them in isolation because we're not being provided by  
21 the Communications Commission the opportunity to know what they  
22 think. What the Commission thinks before it decides to issue  
23 its final rules, which seems to be working backwards. And for  
24 many of us it's of great concern. Many of us in Congress,  
25 Senate and House have expressed in writing our desire to have

1 proposed rules issued prior to any final rules being enacted by  
2 the FCC, and we'd like to have an opportunity for full public  
3 comment, not just for members of Congress but for the public in  
4 general on those proposed rules before they become final.

5 But it seems as well that we have a hear-no-evil,  
6 see-no-evil attitude by those who could communicate the  
7 information to us, and there, by that I mean, as I think both  
8 chairmen just mentioned, are our media outlets. Our -- our  
9 major media outlets, I believe, have done a dramatically poor  
10 job of getting the information out there. And unfortunately,  
11 you talk about hear-no-evil and see-no-evil, that can't be an  
12 excuse because they're the ones that produce what we hear and  
13 what we see.

14 So I hope that this will be a clarion call for the media,  
15 all the media, to come forward and help the public have a  
16 better understanding of what is occurring over the next several  
17 weeks. And I hope longer than just the five or so six weeks  
18 that we have left before comment is to close and rules will be  
19 issued.

20 I want to mention a couple of other things. Diversity.  
21 It seems to me as we talk about diversity ownership within the  
22 media universe, we forget perhaps the most common meaning of  
23 the word diversity in America these days. And to me diversity  
24 within the media would also include our ethnic and racial  
25 diversity so that -- and of course gender diversity -- so that

1 we don't just talk about big versus small, rural versus urban,  
2 but we also talk about the fact that in too much of America  
3 most of America is excluded and certainly minority and women  
4 are also very much excluded within the means of ownership of  
5 our media outlets. And I hope, as Chairman Copps had mentioned  
6 and I believe that Chairman Adelstein would also have  
7 discussed, that there is a need to incorporate the needs of our  
8 minority communities of women when we talk about ownership  
9 opportunities within the media.

10 And having said that I would also hope that we would all  
11 urge upon the FCC transparency, as much as possible that what  
12 goes on within the FCC occur within the light of day. And if  
13 it weren't for Chairman -- I wish you were chairman --  
14 Commissioner Copps and now Commissioner Adelstein trying to go  
15 out there and inform the public, I suspect most people in  
16 America would have little understanding of what may be about to  
17 occur in America. So I applaud the efforts of our two  
18 commissioners participating today, but I hope that the FCC, the  
19 Commission as a whole, recognizes that this must be done in a  
20 transparent fashion so that we can all say, when the results  
21 are finally in, that we all understood and had an opportunity  
22 to comment.

23 And finally, let me focus on a few issues that are of  
24 great concern to the Congressional Hispanic Caucus, to Latinos  
25 throughout this country, and certainly to minorities generally

1 throughout this country, and I would include women as well.

2       Ownership. I mentioned it earlier. We've got to do  
3 something about this consolidation that's occurring because  
4 it's -- it's not just a matter of getting big, it's -- it's a  
5 matter of a few, for the most part, white males, getting very  
6 big, and we've got to stop that from happening because if we  
7 want to have a diversity of view reflected in what goes out,  
8 whether it's broadcast, radio, print, you need to have that  
9 diversity of perspective that comes only from your background,  
10 from the opportunities to have been one who grew up from those  
11 origins. I would hope that the FCC, and I know Commissioner  
12 Copps has been one who has always promoted this, but I hope  
13 that the entire membership of the FCC will recognize this as  
14 well.

15       Secondly, expertise. We're about to have final rules  
16 issued soon by an organization which, for the most part, I  
17 don't believe reflects the needs, desires, the background, the  
18 history of women and minorities. And I would pose a question  
19 that perhaps Chairman -- Commissioner Copps and also  
20 Commissioner Adelstein -- I keep -- I'm -- I'm -- I'm hoping  
21 more than anything else, I guess, that Commissioner, you'll  
22 become a chairman. Maybe after 2004 that'll happen. But  
23 getting -- moving on to other things.

24       I hope that what we can do is find that there will be ways  
25 for us to address not just the ownership issue but also what

1 the FCC brings to the table in terms of expertise and resources  
2 to address the issues that are important to minorities, African  
3 Americans, Asian Americans, Native Americans, Latinos and  
4 women. Who do you have on your staff to guide you on some of  
5 these very important principles and will you have people of  
6 color and women who can guide you in making those decisions? I  
7 would pose that question to the chairman, Mr. Powell, to see  
8 where that takes us.

9 And finally, finally, when it comes to the issues -- when  
10 it comes to the issues of how minorities are treated, I hope  
11 that we'll recognize as well that we have to tackle some very  
12 important issues that in some cases the media outlets have very  
13 little control over. Nielsen and Arbitron do a tremendous job  
14 of trying to gauge ratings, but in some cases I think they do a  
15 very flawed job in that regard. And too often they don't take  
16 into account how many people of color, how many women are truly  
17 watching what they really want, and I believe it will be time  
18 soon that we examine whether the monopolies that we allow  
19 Arbitron and Nielsen to maintain within the rating system will  
20 be a subject of review by the FCC, or certainly I hope by  
21 Congress because it seems to me that if we want to give the  
22 media the best opportunity to do a good -- not only a good job  
23 but a tremendous job of doing well with the airwaves that the  
24 public has given to them, then we have to make sure that they  
25 have the best information on which to make their decision and

1 that's where Nielsen and Arbitron truly require some oversight.

2 I would only make the final point that I believe with --  
3 as Chairman Copps -- Mr. Copps -- Commissioner Copps -- it's --  
4 it's ingrained, sorry -- that Commissioner Copps made, that  
5 perhaps what we should do is truly look at the licensing issue.  
6 That might give us a better sense of what people are doing so  
7 that instead of after the fact, after a media organization has  
8 not done a good job, but before we give them a license that we  
9 determine what they will do and find out if they follow  
10 through. I think that's a wise course of action.

11 I appreciate, Sandra, what you have done here. I'm  
12 pleased to see so many people here. I hope we have some media  
13 representation that will report on what goes on here today, and  
14 I hope and pray that this will not be the last, certainly not  
15 within the five-week period, that we hear from the chairman and  
16 the commissioners on this very important issue. Thank you so  
17 very much.

18 **MS. ORTIZ:** I'd also like to recognize that Congresswoman  
19 Diane Watson, who could not be here today because she's flying  
20 back to Washington -- the congressional recess is ending -- I  
21 think Congressman Becerra is running off to catch a flight  
22 also -- but she -- Congresswoman Diane Watson, who is chair of  
23 the Congressional Entertainment Caucus did send a  
24 representative, her press secretary, Lois Hill-Hale, who is  
25 with us today and will be reporting back to the congresswoman

1 about today's events.

2 I'm also pleased to report that we have Commissioner  
3 Adelstein back on line, and we'd like to hear the end -- the  
4 end of that -- that setup that you had intrigued us with when  
5 we got cut off so suddenly. So -- excuse me -- Commissioner  
6 Adelstein.

7 **COMMISSIONER ADELSTEIN:** Well, thank you so much for  
8 bringing me back. Am I back up? It's working?

9 **MS. ORTIZ:** Back up.

10 **COMMISSIONER ADELSTEIN:** All right. Well, if -- if an FCC  
11 Commissioner can't telecommute, who can?

12 I was speaking about your very own William Randolph  
13 Hearst, somebody of great interest to the people in L.A. and  
14 somebody you know a lot about. And I'm not sure when it cut  
15 off, but I was trying to say that he was trying to decide, you  
16 know, people -- he was in the -- he was in the movie business  
17 and he was in the newspaper business, and when he was asked why  
18 he was concentrating on newspapers with a limited regional  
19 appeal rather than spending his energy on motion pictures with  
20 a worldwide audience, he pithily replied, "I thought of it.  
21 But I decided against it. Because you can crush a man with  
22 journalism and you can't with motion pictures." Well, we may  
23 well be on the verge of creating a new Citizen Kane for the  
24 21st century or maybe a handful of them.

25 The FCC should proceed with a lot more caution because

1 caution and speed don't mix well, particularly not when our  
2 safeguards of democracy are at stake. Diverse views fuel our  
3 public debate and they strengthen our democracy. We need more  
4 voices in the nation's media but not just from one  
5 ventriloquist. Each of you should be a part of this dialogue.  
6 That's why I'm so glad we're doing what we're doing here today.  
7 I can't emphasize enough the importance of your participation.  
8 If we're to craft media ownership rules that best serve the  
9 public interest, we've got to hear from the public. That's why  
10 Commissioner Copps and I are traveling around the country to  
11 hear your voices. And I'm so pleased that Commissioner Copps  
12 has shown such great leadership. He was there before I got  
13 there and he did a great job of setting this -- setting this  
14 up.

15       So good luck and know that you're engaged in what is the  
16 most critical dialogue taking place in America today. And  
17 thank you for letting me be a part of it, and thank you for  
18 letting me come back in after a little audio disruption there.  
19 I really appreciate it. This is a great honor to be with you  
20 today. Back to Sandra.

21       **MS. ORTIZ:** Thank you, Commissioner Adelstein. I'd now  
22 like to introduce Matt Spitzer, who is dean of the USC Law  
23 School. Dean Spitzer founded the Center for Communication Law  
24 and Policy and has written extensively on telecommunications  
25 issues. Dean Spitzer.



1           **DEAN SPITZER:** Pardon me. I think it works better this  
2 way. You get fewer of the exploding P's in this configuration.  
3 I want to say welcome to everyone. USC Law and -- Law School  
4 and Annenberg School jointly sponsor the Center for  
5 Communication Law and Policy. Sandra Ortiz is our executive  
6 director and has put together this -- I should say this  
7 conference twice and for that I want to thank her. I want to  
8 thank Commissioner Copps and Adelstein and all the other  
9 participants here today. I look forward to a great success.

10           I want to say two things. Then I'll sit down. I'll try  
11 to be brief. First, I want to talk sort of about the tone of  
12 the proceedings and second I want to introduce Christopher Yoo.

13           First, about the tone. This is not a corporate boardroom.  
14 It's not a guild hall. It's an academic setting. And as such,  
15 I'll give you the two-minute version of my introductory lecture  
16 to my administrative law course about the difference between  
17 private interest and public justifications.

18           Private interests are perfectly fine for motivating you to  
19 action. But they're not always the things you can talk about  
20 effectively in public as good reasons for doing something.

21           For example, I'm a teacher. I'm an educator here at USC.  
22 It is entirely possible that the advent of online educational  
23 schools will cost me my job. There are now online law schools  
24 which are growing very rapidly. Most people who know about the  
25 law school world expect about -- okay -- expect about -- about

1 a third of us to fail within the next 20 years. That is, we  
2 become history. My salary, if I'm still working 20 years, will  
3 almost certainly be lower than it is today because of  
4 competition from online schools. None of this is a  
5 justification for invoking governmental regulation to suppress  
6 online education, in spite of the fact that I and others like  
7 me will be hurt and that old institutions that have been around  
8 for many years will be swept away. Instead, you need to make  
9 arguments about students being better or worse served, being  
10 better or worse educated and so forth in order to make public  
11 interest --

12 (End of Side A of Tape 1, Beginning of Side B.)

13 **DEAN SPITZER:** My industry segment will disappear or even  
14 I will have less creative control over my work. Why? Because  
15 public interest arguments are those that are designed to  
16 produce -- pardon me -- public interest arguments are sort are  
17 sort of the following nature. The set of rules that govern  
18 industry structure will produce an output that either produces  
19 less interesting, less creative fare that is not as interesting  
20 to viewers and listeners. That's a public interest argument.

21 Perhaps the industry structure produces less news in  
22 public affairs that allow citizens to make informed decisions.  
23 Perhaps it produces higher ad rates, which ripple through the  
24 cost of purchased goods and thereby transfer large amounts of  
25 money from the public to sellers of ad time. All right. These

1 would be public interest arguments. However, saying it so  
2 doesn't make it so.

3 At an academic setting empirical testing is, in my  
4 opinion, and by the way in the opinion of the D.C. circuit,  
5 absolutely necessary. Once you've said the argument, you still  
6 have to back it up.

7 Okay. I'll move on. I think the microphone is telling me  
8 I've said enough in this regard and so I will. Instead I'll  
9 move on to introducing our speaker. Christopher Yoo is going  
10 to give us a legal overview of ownership regulations.

11 Christopher is a professor at Vanderbilt. He's prolific. He  
12 writes on law and economics of telecommunication, including  
13 broadcasting and cable TV. I particularly recommend an  
14 extremely extensive survey and synthesis of the law about  
15 vertical integration as applied to broadcasting and cable.  
16 It's in the Yale Journal on Regulation. And if you don't do it  
17 at least give it to someone in your General Counsel's office to  
18 read because someone should know this stuff.

19 At any rate, the definition in academia of a sophisticated  
20 scholar is "someone who thinks a lot like I do." And -- but  
21 only -- and only sometimes do we have the qualifier "but does  
22 it a little better." And so it's -- it's my pleasure to  
23 introduce a sophisticated young scholar, Christopher Yoo.

24 **MR. YOO:** Well, part of the sophistication is the high  
25 tech toys I get to play with. So if you'll bear with me while

1 the screen comes down.

2 It's an occupational hazard as a teacher. I'm really  
3 troubled without a blackboard, so I'm afraid this is the best  
4 I'm going to be able to do here.

5 My job here is to provide a legal overview of the media  
6 regulations that are comprising the biennial review that will  
7 culminate apparently on June 2nd by the -- with the announced  
8 attention -- intention of the Federal Communications Commission  
9 to revisit a large number of media ownership rules. These  
10 media ownership rules have been in play since at least the  
11 1970's unchanged and have their seeds, many of them -- or their  
12 origins, back in the 1930's. And I believe that we are at an  
13 unprecedented crossroads in U.S. media policy for several  
14 reasons.

15 First is, there are an emergence of tremendous new  
16 communications technologies that have opened up the policy  
17 space since these rules were last revisited in the 1970's.  
18 There's a tremendous expansion in the number of broadcast  
19 outlets, television stations. As recently as 1980, the average  
20 household received fewer than four. The average U.S. household  
21 now receives in excess of 13 over-the-air broadcast signals.  
22 Cable, direct broadcast satellite systems have transformed the  
23 television environment, Internet, through generation wireless  
24 in the offing, all of which have dramatically changed the  
25 policy environment in which we operate.

1           Second is significant changes to the legal environment.  
2   The first of which is the biennial review process initiated by  
3   the Telecommunications Act of 1996. For the first time the  
4   federal statute requires the Federal Communications Commission  
5   to revisit all of its ownership regulations every two years  
6   with the presumption that absent adequate justification that  
7   they will be repealed. The other thing that's happened that's  
8   dramatically changed the environment is a number of recent  
9   judicial decisions that have struck down a number of these  
10   longstanding ownership policies. Two were decided in 2002, one  
11   was decided in 2001, and they have raised serious questions  
12   about whether the continuing vitality of a lot of these rules  
13   and whether they'll continue to exist.

14           And lastly, I think there's a great deal of new thinking  
15   about regulation. I think the seminal moment occurred when  
16   President Clinton, a democrat, said, "The era of big government  
17   is over." That opened up a brand new dialogue wherein people  
18   of all parts of the political spectrum are willing to think  
19   about new solutions to old problems and rethink the way we  
20   approach classic regulatory issues.

21           The net result is many of the rules that we are going to  
22   talk about today are up for grabs for the first time in 60  
23   years since they were originally promulgated, and it's created  
24   a tremendous amount of interest in what the future of the  
25   industry will hold.

1           There are six rules under scrutiny and they actually can  
2 be -- they can be categorized in three different ways, into  
3 three different pairs. The first set of rules affect local  
4 ownership limits. Local ownership limits within a medium.  
5 Specifically there's two of these. First is, how many radio  
6 stations you can own in Los Angeles. That is one medium.  
7 Radio. One locality. Los Angeles or New York or Chicago. And  
8 there are limits to the number of radio stations that any --  
9 historically been limits that any one entity can own.  
10 Similarly there are limits to the number of television stations  
11 within one medium, within one geographic area, that an entity  
12 can own.

13           The second set of rules also deal with local ownership but  
14 not within one medium but across media. In fact -- and there  
15 are two rules that are relevant in the proceedings. The first  
16 is the radio-television cross-ownership limits. It's not  
17 within radio, not within television, but how many radio and  
18 television combinations can you own in Los Angeles or Nashville  
19 or Atlanta or any of the cities in the United States.

20           The other cross-ownership restriction that's being  
21 discussed is a newspaper-broadcast cross-ownership ban that has  
22 been in place since the 1970's. A newspaper cannot own its --  
23 newspaper broadcast -- that's broadcasting, including both  
24 radio and television -- as a matter of rule cannot own a  
25 newspaper -- a newspaper cannot own a radio or television

1 station in the same city in which it operates.

2 And lastly, there's two sets of restrictions currently  
3 being debated that are really focused not on local markets but  
4 on national markets. The first of which is called the national  
5 television station ownership rule that limits the ability --  
6 the number of stations that a entity can own nationwide.  
7 That's aside from the number you can own in Los Angeles, but  
8 can a Los Angeles owner own one in New York, in Chicago, in  
9 Seattle and the different cities?

10 And the last thing is what they call the dual network  
11 rule. How many broadcast television networks can one company  
12 own? All of these are currently being considered and they're  
13 all going to be decided apparently in June.

14 Taking them one at a time. The first set of rules is the  
15 local ownership limits within one medium starting with radio.  
16 How many radio stations can one company own in any one city?  
17 The original rule prohibited any company or any person from  
18 owning more than one radio in the same city. Radio station in  
19 the same city. The concern was that if there -- since there  
20 were so few stations in any one market, allowing any entity to  
21 control more than one them would give them an inordinate amount  
22 of control over the points of view expressed in that market.

23 What has happened since these rules were promulgated back  
24 in the 1930's, what happens is we've had a radical expansion in  
25 the number of radio stations that are now available compared to

1 what existed in the 1930's or even what existed in the 1970's.  
2 And in fact, as the number of radio stations expands radically,  
3 the concern that any two of them would be controlled by the  
4 same entity diminishes because the problems go down.

5 Second, there is a realization that group ownership of  
6 radio stations within a market allows the realization of  
7 certain efficiencies. Two small-share stations can combine one  
8 sales force and make sales calls more effectively. And if  
9 they're niche radio stations that are pointed at different  
10 markets, they can cross-sell advertising to a single advertiser  
11 and it makes it possible. The FCC has recognized through a  
12 series of rule-makings that it's made it more possible for them  
13 to deliver more programming.

14 So instead of a blanket ban, they've now adopted what's  
15 called -- what I'll call a tiered approach. The tiered  
16 approach is really determined by the number of radio stations  
17 in a particular market. The different tiers and the amount of  
18 the ownership restrictions are determined by the number of  
19 stations in the market. Now L.A. will be 45 or more, the next  
20 tier down is 30 to 44, 15 to 29 and on farther down. The more  
21 stations that are on the market, the more you allow individual  
22 stations -- you can allow individual stations to be under the  
23 same ownership and not have the kind of public interest and  
24 anti-competitive concerns that have animated these rules.

25 And the rules as they exist today, if you have 45 or more



1 stations in the market, you get eight. If you have 14 or fewer  
2 you get five. You can combine five and on down. There is one  
3 thing I'd like to point out about this, is that if you look at  
4 the way the tiers are set up, the distinctive aspect about this  
5 is it only counts the number of other radio stations in the  
6 market. So in measuring what's competition, they're looking  
7 solely within one media, radium -- medium radio.

8 And they don't largely take into account other media.  
9 There's an almost identical set of -- analogous set of  
10 restrictions that apply to television. Again, it began  
11 originally as a bar on stations owner -- owning more than one  
12 television station in the market. That was very appropriate  
13 when most parts of the country could not receive more than  
14 three or four broadcast signals over the air. As I stated, in  
15 the current environment the average U.S. household receives 13  
16 broadcast stations over the air and it's now -- changed the  
17 concern that these sorts of combinations would raise.

18 Again, we've adopted a tiered approach. The tiered  
19 approach focuses on the number of independent voices in the  
20 market. If there are eight or more, one rule applies. If  
21 there are seven or fewer, a different rule applies. Number of  
22 voices means station groups. In other words, if two -- if  
23 two -- two stations under common ownership, they're one  
24 independent voice in the market. And the answer is if there  
25 are seven or fewer independent voices in the market,

1 combinations of television stations are not allowed. If there  
2 are eight or more combinations of television stations are  
3 allowed, so long as the stations that are combining are not in  
4 the top four stations in the market.

5 Again, the number of voices here is limited to television  
6 voices. And looking at the amount of competition that will  
7 relieve our concern for this kind of combination, we are only  
8 looking at television. This is critically important because  
9 this rule was invalidated by the courts in 2002. For precisely  
10 its willingness to consider only television voices and is in  
11 direct contrast with the next one I'd like to talk about, which  
12 is where we start the cross-ownership rules.

13 So we're moving beyond where we're looking within one  
14 medium and we're now looking at the number of stations that can  
15 be owned jointly. There's a radio-television cross-ownership  
16 rule within the same market that limits the number of  
17 combinations of radio and television. Again, the original rule  
18 dating back to the 1930's said one to a market. You can have  
19 one AM radio station or one FM radio station or one television  
20 station, but you could not own both. Both radio and television  
21 or both AM and FM. As the market has broadened and the  
22 technologies made it possible for us to have more, they've  
23 created, again, another tiered approach based on the number of  
24 independent voices in the market. Here we have three tiers.  
25 One with 20 or more voices. Ten to 19, or nine or fewer, and

1 you allow a varying number of increasing level of concentration  
2 and co-ownership depending on the number of voices in the  
3 market.

4 Here's the critical difference, though. The voices -- in  
5 counting of voices, it's no longer restricted to just radio and  
6 television. This particular rule starts to acknowledge that we  
7 have new communications media in the world and this rule  
8 includes cable and newspapers in the count of the number of  
9 voices underlying the competition that relieves the concerns  
10 that we have.

11 The reason this is important is that the difference in  
12 approach between this and the television cross-ownership rule  
13 is what led the courts to strike down the television local --  
14 the local television ownership rule. They said, why is it that  
15 a voice -- newspaper and cable, count as voices for purposes of  
16 the radio-television cross-ownership rule, but newspaper and  
17 cable does not count as a voice in the local television  
18 ownership rule? They say there may be an explanation for that,  
19 but you haven't explained why you would draw such a distinction  
20 and they vacated the rule as -- I'm sorry -- they remanded the  
21 rule as arbitrary and capricious, and it's currently being  
22 reconsidered by the FCC.

23 The other rule that's up is cross-ownership is not radio  
24 television, it's newspaper-broadcast. Again it has its  
25 origins. The current rule existed -- created in the 1970's

1 bars any newspaper from owning any broadcast outlet. And in  
2 fact what's -- what's notable from the purposes of our  
3 standpoint is this is not a tiered approach. It does not  
4 matter how many other broadcast outlets or cable outlets or  
5 radio outlets would be in the market. The newspaper  
6 cross-ownership ban stands as an absolute bar no matter how  
7 diverse the underlying media market is. There's another key  
8 fact to this, is that in fact 54 broadcast-newspaper  
9 combinations do exist. Fifty-four of them were either  
10 grandfathered in or granted permanent waivers, and they now  
11 exist. And it's one of the interesting things of the ongoing  
12 review is, what has been the impact? It's a natural experiment  
13 that we can start to understand the role of newspaper-broadcast  
14 cross-ownership. This is one of the few rules that made it all  
15 the way to the Supreme Court in its current form. It was  
16 sustained by the Supreme Court in 1978 against a First  
17 Amendment challenge, and it's currently being reconsidered by  
18 the FCC, those initiated prior to the current view in 2001.  
19 And that's part of an ongoing process that the FCC has taken  
20 even outside the biennial process to evaluate its rules.

21 The other two rules are the ones national in focus.  
22 This -- the national television station ownership rule limits  
23 the number of stations you can own nationwide. The concerns  
24 are different. This is owning a station in New York and L.A.  
25 It will not reduce competition in L.A. You will have the same

1 number of choices in L.A., the same number of choices in New  
2 York. What is really concerned is its impact on the national  
3 market for advertising, the national market for program  
4 production. And the original rule prohibited ownership of more  
5 than three stations nationwide. And this has gone beyond a  
6 series of liberalizing moves that became a rule -- started as a  
7 rule of three, became a rule of five, rule of seven, rule of  
8 twelve, steady broadening because they realize that there are  
9 efficiencies if you own a station in Atlanta and L.A. and  
10 Chicago; managerial efficiencies, operational efficiencies that  
11 can make it very effective. And in fact what happened in the  
12 1996 act, they abolished any absolute limitation on the number  
13 of stations you can own. Subject to one very large caveat.  
14 The caveat is that the combined reach of any station group  
15 cannot exceed 35 percent of the national audience. This is  
16 part of the -- this is a major issue because currently, after  
17 the Viacom-CBS merger, Viacom is now currently in violation of  
18 this at excess of 40 percent, granted waivers by the FCC, and  
19 Fox's acquisition of Chris-Craft now exceeds the 30 -- they now  
20 exceed the 35 percent cap.

21 As part of the biennial review process, the FCC considered  
22 whether they should remove this rule in 2000 and they declined  
23 to do so. The reason this is very much up for grabs right now  
24 is judicial -- the courts have ruled that the FCC's decision  
25 not to reconsider the national television station ownership

1 rule was arbitrary and capricious and they sent it back to the  
2 FCC for reconsideration.

3 The last of the rules is the dual network rule. The dual  
4 network rule originally was drafted because of the NBC blue and  
5 red network, which was -- we had two networks in the same  
6 control. Started off as a radio rule and they had -- again  
7 they had the problems with the blue and red network in  
8 television. In the rule -- the solution the FCC had was to  
9 prohibit any company or any person from owning more than one  
10 television network. In the world of cable and cable networks  
11 and where there are 200 -- in excess of 200 cable networks  
12 operating and 70 more on the drawing boards at any time, this  
13 rule has been under reconsideration for quite some time, and in  
14 fact there's -- certain recent merger activity placed  
15 particularly strong deregulatory pressure on it. Viacom's  
16 acquisition of CBS put it in a position where it had an  
17 ownership interest above CBS and UPN. So there was a  
18 reconsideration to the rule. The current rule allows ownership  
19 of two networks unless both of the networks are in the top  
20 four. That is ABC, CBS, NBC and Fox. CBS can own UPN. NBC  
21 can own PAX. But the only thing -- the only merger that would  
22 be barred under these rules would be a combination of the four  
23 leading broadcast networks.

24 So those are the big -- those are the six rules. A very  
25 quick perusal through them to give you a flavor of what's going

1 on. What are the policy considerations that are going to  
2 underlie all of this?

3 Well, the first I would say is, this is often discussed in  
4 terms of very bipolar terms where all the rules were almost  
5 identical and it's a choice between regulation and  
6 deregulation. I don't think that's true. All these different  
7 rules will have different impacts on different segments of the  
8 industry and different parts of the inputs that provide the  
9 industry. It will affect the guilds differently. It will  
10 affect the networks differently. It will affect the cable  
11 station -- the cable operators and the television stations very  
12 differently. And people who attempt to reduce this debate into  
13 a clash between regulation and deregulation I think will  
14 misunderstand the issues and misserve the people they're  
15 representing because there will be winners and losers of  
16 extremely unusual stripes no matter how these rules come out.

17 The other thing is the -- the other dominant theme that's  
18 driving all this is the emergence of new media. Cable and  
19 other forms, DBS now control 86 percent of the market. The  
20 world in which these rules were written where broadcast  
21 networks were three and dominated the television landscape is a  
22 very, very different world. And its opened up the policy space  
23 in fascinating ways.

24 The other thing that's interesting is the emergence of new  
25 media -- not all media are created equal, and we have a very

1 complicated set of questions about, do you just count a radio  
2 voice the same as you count a television voice? And even among  
3 television voices, some are louder than others. Market share  
4 matters and simply adding up the voices does not give you a  
5 sufficiently sophisticated understanding of exactly how  
6 competitive a market is.

7 The other thing is the economics of information. There's  
8 a growing number of -- of insights provided by this. The  
9 basic -- the most fundamental concept is what people call first  
10 copy cost. Anyone who creates any information good knows that  
11 all the costs are created in the first copy and the subsequent  
12 copies are extremely cheap. That's true of movies, it's true  
13 of music, it's true of newspaper and local information. And  
14 what's fascinating is that the economics of information suggest  
15 that some amount of media consolidation might be good. There's  
16 a story out of Boston that a new -- this Boston newspaper  
17 sought a waiver of the newspaper-broadcast cross-ownership ban,  
18 saying that if you allow us to do that we will get another  
19 newspaper into Boston. And if you don't allow us to take the  
20 same content we develop for the newspaper and roll it out  
21 across both outlets, we won't make enough revenues to survive.

22 That tells me that the relationship between consolidation  
23 and local content and diversity of content and competition can  
24 be quite ambiguous. Under certain circumstances, allowing  
25 consolidation to occur can in fact enhance the amount of local



1 content and diversity of information available.

2       The last is there are significant efficiencies in media  
3 consolidation. I'll give you an example out of my own hometown  
4 of Nashville. Currently, UPN, WB and Fox jointly market  
5 advertising time. Why? Because none of their shares  
6 individually is enough to support a solo sales force, and  
7 they're all targeting towards different segments of the market.  
8 And a sales call can't meet a particular advertiser's needs,  
9 and they find that it's much more effective for them to do so.  
10 Would that be true in every market? Not necessarily. But it's  
11 clear that we've now opened up the way we think about these  
12 issues and ways to consider the possibility that consolidation  
13 might actually allow new fledgling networks to succeed where  
14 they otherwise couldn't.

15       Two last points. Legal considerations are on the table.  
16 First is what Professor Spitzer -- Dean Spitzer -- mentioned is  
17 the importance of empirical evidence. The 1996 acts that  
18 requires the FCC to consider whether a rule is no longer  
19 necessary is the result of meaningful economic competition, and  
20 the courts have interpreted as requiring the FCC to have a  
21 solid empirical foundation. A factual foundation for  
22 everything it does. This has been a tremendous change. In the  
23 past the FCC has been willing to wait and see what happens in  
24 the market. It's pretty clear where this new regime as a legal  
25 matter, waiting and seeing is no longer an option for the FCC,

1 at least under the D.C. circuit's interpretation of that.

2 The other problem is the empirical studies are quite mixed  
3 on the affect of consolidation, and I think the fairest read as  
4 a person who is not -- doesn't have any particular dog in this  
5 fight is that if anything, it suggests that consolidation is  
6 neutral with regard to diversity, localism and competition.  
7 And in fact a large number of the studies suggest that allowing  
8 more consolidation to occur would produce more diverse and more  
9 local content on the airwaves and in the general media. That  
10 is a controversial proposition. There are 12 studies by the  
11 FCC. Some were criticized by their -- the people who want to  
12 keep the regime going, but there's a very vibrant literature  
13 that's largely getting -- not getting the attention it  
14 belongs -- deserves.

15 And the last thing from a legal standpoint is what led to  
16 the strike down of the one rules is that you'll discover that  
17 the tiers and the willingness to consider alternative voices  
18 are generally contradictory, and there is not really a unified  
19 approach taken by the FCC. In fact, that's anathema to a legal  
20 scholar. Being consistent across the board is one of the  
21 obligations administrative agencies have, and it's one of the  
22 problems that the FCC is confronting about how to unify all  
23 this around a consistent perspective.

24 The last comment I will make is that this is only the big  
25 major round in what's going to certainly be an enduring fight.

1 There are a number of other issues waiting in the wings. The  
2 national cable ownership rules and the channel capacity rules  
3 recently struck down by the courts are up for reconsideration  
4 as well. There is a cable DBS cross-ownership proposal up,  
5 digital television, whether they have to be carried on cable  
6 and what public interest obligations they'll bear. The  
7 deployment of third generation wireless devices waits in the  
8 offing. There have been a number of proposals to revive a rule  
9 called FINSYN, the financial and syndication rules, which will  
10 be of tremendous interest to the next panel. And whatever the  
11 resolution happens on June 2nd, this will only be another  
12 round, although a major round in what is almost certain to be a  
13 very long and protracted debate about the media ownership rules  
14 that will govern the media in the future. Thank you.

15 **MS. ORTIZ:** Thank you, Professor Woo. I want to point out  
16 something I'm sure you're all aware of, which is we are running  
17 very late. That's the problem -- the challenge we faced in  
18 paring down a full-day event to a half-day event is that we had  
19 such incredible speakers and we want to give them the time to  
20 make their statements.

21 We're now going to start the first panel. We are going to  
22 allow the panelists to have their time because that's why we  
23 are all here and that's why they've made the time to be here  
24 and try to make up some of the time during the breaks. And  
25 frankly, the event will probably go just a little bit late

1 because I don't want to cut short the public comment period  
2 either. Our real deadline at the end of the day is making sure  
3 that Commissioner Copps gets out of here in time to catch his  
4 flight and we, I think, have a little -- I may feel more  
5 comfortable with the leeway we have than he feels comfortable,  
6 but we'll see how that goes.

7 I would like to now introduce Tracy Westen, who will be  
8 moderating both of the panels today. Tracy is an adjunct  
9 professor of media law at the USC Annenberg School for  
10 Communication. He is also a former deputy director of the  
11 Federal Trade Communications Bureau of Consumer Protection and  
12 founder and director of the Los Angeles-based Center for  
13 Governmental Studies, which promotes a more open, responsive  
14 government. Tracy also spent two years as a legal advisor at  
15 the FCC not so long ago. Tracy.

16 **MR. WESTEN:** Thank you, Sandra. This first panel is  
17 Economics and Diversity in Programming, and it raises the  
18 question, why focus on entertainment? Why is entertainment  
19 important and relevant to an FCC proceeding on ownership of the  
20 media?

21 Well, as Justice Harlan once said, "One man's  
22 entertainment teaches another doctrine." The line between  
23 entertainment and news is, for better or worse, increasingly  
24 illusory. Entertainment informs. News entertains. Both are  
25 essential to a functioning democracy. The core question here,

1 I think, is what rules allowing concentration of ownership and  
2 control over the media will unleash the greatest burst of  
3 creativity, diversity and competition that our nation wants,  
4 needs and deserves? Do new channels, new media outlets and  
5 globalization require media conglomeration or media  
6 organizations to bulk up, so to speak, to increase their  
7 ability to present high quality entertainment? Or will greater  
8 concentration squeeze out diversity and creativity and  
9 innovation in programming?

10 It seems that the FCC addresses these major controversial  
11 issues almost every 30 years. In the 1940's, the FCC addressed  
12 network ownership and the contractual relationships between the  
13 networks and their affiliates, adopting rules, some of which  
14 are still with us today. In the 1970's, the FCC adopted the  
15 Financial Interest and Syndication Rules and the Prime Time  
16 Access Rules, some of which were repealed in the 1990's. And  
17 30 years after that, in the 2000's, the FCC is again addressing  
18 these very important questions in an environment of more  
19 channels, increased technology, different regulatory approaches  
20 and different approaches to the First Amendment.

21 We have with us today an extraordinary panel. Their bios  
22 are listed in your packets, so I will not spend time repeating  
23 them all because time is short. If you've checked your  
24 watches, this panel is already halfway over. So we will extend  
25 the time and try and give each speaker about ten minutes. I

1 will remind them at about the eight- or nine-minute mark that  
2 the time is coming to a close. We will proceed in the order  
3 from your left all the way over to the right. We also, I  
4 believe, have a speaker, Martin Franks, by video conference,  
5 who will speak at the end of this presentation.

6 So let's start with Mark Pedowitz, on your far left,  
7 Executive Vice President of ABC Entertainment Television Group,  
8 oversees ABC Late Night and ABC Kids' Programming.

9 **MR. PEDOWITZ:** Thank you, Tracy. My name is Mark Pedowitz,  
10 and I am Executive Vice President of the ABC Entertainment  
11 Television Group. My responsibilities include negotiating the  
12 business arrangements for the right to exhibit entertainment  
13 programming on the ABC Television Network and overseeing  
14 production of business for Touchstone Television. I have  
15 extensive experience in the business relationship between  
16 program producers and networks. Prior to joining ABC in 1991,  
17 I helped (inaudible) for a legal position in an MGM/MCA  
18 (inaudible) entertainment and (inaudible) company. To put it  
19 simply, I have been on every side of the table regarding the  
20 licensing and programming for television networks. With me  
21 today is (inaudible), President of the ABC Television Network,  
22 who will be available to answer any questions you may have.

23 My comments today will focus on recent efforts to  
24 re-regulate programming aspects of network television. Based  
25 on my experience, there is absolutely no factual or legal basis

1 for the government to wade into the marketplace with network  
2 television programming. Today's television business bears no  
3 resemblance to the free network world and (inaudible) the basis  
4 for government regulation of network programming practices.

5 Despite the fact that there will always be complaints  
6 about TV programming, and despite a hazy and forgetful  
7 nostalgia for what some call the Golden Age of Television, the  
8 indisputable fact is that the American consumer today enjoys a  
9 greater quantity, quality and variety of television programming  
10 than at any time in our nation's history.

11 In the early 1970's, the television industry consisted of  
12 almost entirely of three broadcast networks. For example, in  
13 1975, the three-network share of prime time programming was 93  
14 percent. Seeking greater diversity and choice for consumers,  
15 for advertisers and for program producers, the government set  
16 out on a two-pronged effort, to create greater competition.  
17 First, the government imposed FCC rules and judicial consent  
18 decrees to regulate the business relationship between network  
19 and program producers. These became the financial interest and  
20 syndication provisions, and they were premised on the concern  
21 that program producers had only three places to try to license  
22 their shows. The second part of the government program was an  
23 effort to stimulate more competition and more options for the  
24 television viewer.

25 By the early 1990's, the effort to create more channels of

1 television choice succeeded. The factual and legal basis for  
2 the financial interest and syndication restrictions were now  
3 antiquated in the marketplace. Viewers could choose programs  
4 from four broadcast networks and more than 100 new cable  
5 networks. Similarly, program producers could offer their  
6 programs to far more outlets than had existed in the early  
7 1970's. Although disputes continued between networks and  
8 program producers, the access bottleneck of the original three  
9 networks had been broken. Despite the elimination of the three  
10 network (inaudible) by the early 1990's, production entities  
11 have benefited from the financial interest and syndication  
12 rules fought long and hard to retain those restrictions;  
13 however, following a strong review by the Seventh Circuit Court  
14 of Appeals, (inaudible) Communication versus the FCC, the FCC  
15 chose to repeal its rules and then (inaudible) the Department  
16 of Justice successfully asked the courts to vacate (inaudible)  
17 consent decree.

18       Given the many networks to which program producers could  
19 seek to license their programs, there was no longer any factual  
20 or legal basis for continued government intervention into the  
21 business relationship between network and program producers.  
22 In striking down the rule, the Seventh Circuit stated very  
23 plainly that the FCC could not ignore the fact that the  
24 networks as of 1992 had lost market power. The court that  
25 dissolved the consent decree found that when all is said and



1 done about the changes in the television industry since 1980,  
2 it could hardly be said that 34 percent, for an average  
3 slightly more than 11 percent, the reach of NBC, ABC or CBS  
4 amounts to a marketplace power, the basis of the consent  
5 judgments. The Seventh Circuit went so far as to express new  
6 skepticism about whether the rules ever made any sense. They  
7 found, as a result of the rules, television production became a  
8 riskier business and the production of prime time programming  
9 became more concentrated. The court added the basis for the  
10 rules was never very clear, and they have done nothing other  
11 than insulate independent producers from competition from new  
12 producers and from the networks.

13 It is remarkable that ten years after (inaudible) factual  
14 basis for these ill-conceived rules (inaudible). There are  
15 those who suggest that it should be brought back to life.  
16 Whatever self-interest might motivate their clinical agenda,  
17 the law in this area is clear. The rules cannot be re-imposed  
18 unless market conditions needed to justify them can be shown to  
19 exist today, and it is indisputably evident that they do not.  
20 The courts found, in 1992 and 1993, the rules could not be  
21 justified on the strength of network power that then existed.  
22 As I describe in a moment, it is indisputable that the  
23 networks' market power has only continued to erode since the  
24 early 1990's. (Inaudible.) Michelle, thank you.

25 Here is a chart that shows the universe of broadcast

1 television networks in 1970, 30. And here is a chart that  
2 lists over 300 networks and cable programming services in  
3 existence today. Since the repeal of the financial interest  
4 and syndication rules in 1993, the television marketplace has  
5 become even more competitive and diverse. Today, if you  
6 include Fox Broadcasting, the total four networks' share of  
7 prime time viewing is now under 45 percent. If a producer or  
8 production company is unable to develop or license a program  
9 with ABC, they can take their program to a broadcast network  
10 competitor, NBC, CBS, UPN, WB, FOX, PBS or PAX. Or they can  
11 take their program to one of the more of hundreds of cable  
12 networks such as USA, SCI-FI Channel, Lifetime, HBO, TNT,  
13 Showtime, A&E, FX, Hallmark, Bravo, or even to a first-run  
14 television syndicator such as Universal, King World, Tribune,  
15 Sony, Warner Brothers. The proponents of regulation cannot  
16 credibly argue that these new networks or outlets are weaker  
17 alternatives to the original three broadcast networks. Indeed,  
18 the contrary is true. Here is a chart that tracks the audience  
19 growth of new cable networks as compared to the audience  
20 decline of the four strongest broadcast networks. As you can  
21 see, the lines actually cross in 2001, with the result that the  
22 new cable networks now command a larger share of the viewing  
23 than do the four largest broadcast networks. While it is true  
24 that on most nights, each of the four largest broadcast  
25 networks have larger audiences than any one individual cable